statutory exemption for larger charities with in-house outreach resources, the *Fraternal Order of Police* majority—now unfettered by the traditional requirement of neutral justification—gravitated to the proposition that such a distinction survives if it "does not give one side of a debate an advantage over the other," and it in any way reduces the number of charitable solicitations (albeit on a blatantly discriminatory basis). 431 F.3d at 598. But this Court has "expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 47, n.3 (1999) (Stevens, J., dissenting) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)). And indeed, to the contrary, this Court's jurisprudence is clear that discriminatory underinclusiveness in speech regulation predicated on the identity of the speaker violates the First Amendment, absent convincing evidence of a neutral justification for doing so.[4]

Still worse, in relying on the Fourth Circuit panel majority's error in the case below, the Eighth Circuit in *Fraternal Order of Police* proceeded to vault from the (unwarranted) premise that the Government may discriminate arbitrarily against smaller charities and telefunders, to the even more extreme and novel conclusion that it may thereby treat such charitable speakers exactly the same as commercial speakers. This further leap disregarded entirely the longstanding First Amendment distinction between charitable and commercial speech, by lumping in with North Dakota's ban on com-

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[4] Moreover, even under the rejected standard, there is a strong sense in which the competition among non-profits for shares of a finite pool of donative dollars *is* a form of debate about the relative merits of different charitable causes, so that selectively impeding the ability of some charities to communicate on the merits *does* give "one side of a debate an advantage over the other."

mercial sales calls the purely charitable solicitations made on behalf of non-profit charities. This plainly contravenes the law of this Court. *See, e.g., Riley*, 487 U.S. at 796. It also denies the basis for the FTC's correct observation that regulation of charitable education and fundraising must be tailored more carefully than that of less-protected commercial speech, so as to "minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf," and requires the exemption of all charitable solicitation from commercial do-not-call regulations. 68 Fed. Reg. 4580, 4636-37 (Jan. 29, 2003). Predictably, it also sharply diverges from the law of other Circuits. *See, e.g., Mainstream Marketing*, 358 F.3d at 1233, 1236 (upholding national do-not-call list restriction on core commercial speech by noting that all charitable solicitations are clearly exempt from the restriction). And as the dissenting judge noted in *Fraternal Order of Police*, the very act of combining regulation of fully protected charitable speech with less protected commercial speech through a single, take-it-or-leave-it do-not-call list over-inclusively forces people who specifically want to avoid commercial telephone calls to sign up for a ban that necessarily comprises purely charitable communications as well. *Fraternal Order of Police*, 431 F.3d at 601 (Heaney, J., dissenting).[5]

From its reliance on the majority decision of the Fourth Circuit in *Nat'l Fed'n of the Blind*, below, a divided panel of the Eighth Circuit has now abandoned, ignored, or expressed overt confusion about multiple longstanding First Amendment principles of this Court. The alarming propagation

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[5] Because it addressed a state law, the *Fraternal Order of Police* majority decision also effectively countenanced a wholesale violation of the Equal Protection clause of the Fourteenth Amendment by permitting North Dakota to discriminate among similarly situated speakers delivering comparable protected charitable speech over the same medium of expression. The panel's opinion did not address this issue at all.

of novel First Amendment departures set in motion below should be halted in its inception.

CONCLUSION

To quell and correct the expanding errors traceable to the abandonment of the "neutral justification" requirement and other constitutional protections in the majority opinion below, the Court should grant certiorari in both this case and the Eighth Circuit's follow-on split decision in *Fraternal Order of Police*, which will be before the Court on a petition for writ of certiorari in a few weeks' time.

Respectfully submitted,

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